Supreme Court, U.S.
FILED
OCT 16 1995
CLERK

No. 95-255

In the Supreme Court of the United States

OCTOBER TERM, 1995

PLUMBERS AND PIPE FITTERS LOCAL UNION NO. 32,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether substantial evidence supports the National Labor Relations Board's finding that the union violated the National Labor Relations Act, and breached its duty of fair representation, by operating an exclusive hiring hall in an arbitrary and discriminatory manner.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-31) is reported at 50 F.3d 29. The decision and order of the National Labor Relations Board (Pet. App. 33-35), and the decision of the administrative law judge (Pet. App. 36-62), are reported at 312 N.L.R.B. 1137.

JURISDICTION

The judgment of the court of appeals was entered on March 28, 1995. A petition for rehearing was denied

on June 7, 1995. Pet. App. 32. The petition for a writ of certiorari was filed on August 14, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In July 1992, Rockford Corporation (Rockford) began a pipeline construction project in Longview, Washington. A labor contract between Rockford and the United Association of Plumbers and Pipe Fitters (United Association) required the United Association to supply Rockford with seven of 13 "rig welders," whom Rockford needed to carry out the project. The United Association, in turn, selected petitioner, Local Union No. 32 of the United Association (Union), to operate a hiring hall in order to find qualified rig welders and to refer them to Rockford. Pet. App. 3-4.

Although the Union maintained hiring hall lists for jobs in the construction and maritime industries, it did not maintain a referral list for pipeline welders. Moreover, business agent Donald Galloway, the Union official responsible for staffing the Rockford job, was unfamiliar with pipeline work, and the Union had not performed any pipeline work within its jurisdiction since 1990. Pet. App. 5, 41. Accordingly, Galloway asked Jeff Manning, who had been selected by the Union to serve as steward on the Rockford job, to compile a list of individuals whom Manning knew to be dependable and qualified rig welders. Galloway also gathered the names of rig welders who had worked on a project staffed by the Union in 1990, and the names of individuals recommended by the business managers of other United Association locals. *Id.* at 5, 41-42. Galloway dispatched rig welders to the Rockford jobsite from this pool of applicants, as they

were needed. *Id.* at 5, 42. However, the Union did not establish any rules governing the operation of its hiring hall: the Union did not maintain any written list of applicants for rig welding work, did not dispatch individuals to the Rockford jobsite in order of application, and did not rank the applicants in any manner. *Id.* at 6, 41, 42-43.

On July 3, 1992, William Harper and Michael Flowers, experienced rig welders who were members of a United Association local in Bakersfield, California, sought work at the Rockford job site. Pet. App. 7, 43. Union steward Manning told Harper and Flowers that he was gathering names for Al Sexton, the Union's business manager, and that Sexton would call them. *Id.* at 7, 43-44. Manning, however, failed his welding test the same day and did no further work on the Rockford project. Two days later, on July 5, Harper and Flowers attempted, unsuccessfully, to speak with Sexton at the Union's office in Seattle; however, they did meet with Tim Elwell, a Union business agent responsible for plumbing, not pipefitting, work. *Id.* at 7, 44. Elwell explained that Sexton and Galloway handled pipeline work referrals and, when pressed by Harper and Flowers, accepted their travel cards, and allowed them to sign what they believed was an out-of-work list for pipeline welders. *Id.* at 7, 44-45.

Five days later, on July 10, 1992, after receiving no response from Sexton and learning that additional welders were taking the welding test, Harper and Flowers went again to the Rockford jobsite. Phil Stroud, the new Union steward, asked them to be patient, promising to allow them to take the welding test. Pet. App. 8. Harper and Flowers returned later that day, after two individuals failed the welding test.

Flowers again asked Stroud whether he and Harper could "get on the job." Stroud responded by referring them to Rockford's foreman, who (according to Harper and Flowers) told them that he did not need additional welders. *Id.* at 8-9, 46. Harper and Flowers remained in the Longview area for several days, waiting, to no avail, for the Union to contact them. Discouraged by their inability to obtain a referral to the Rockford job from the Union, they returned to California. On July 22, Flowers called Galloway, who reported that all the welding jobs on the Rockford project had been filled. *Id.* at 9, 46.

2. Harper and Flowers filed unfair labor practice charges against the Union. On October 7, 1992, the General Counsel of the National Labor Relations Board (Board) issued a consolidated complaint, alleging that the Union breached its duty of fair representation, and violated Section 8(b)(1)(A) of the National Labor Relations Act (NLRA), 29 U.S.C. 158(b)(1)(A), by arbitrarily refusing to dispatch Harper, Flowers, and other qualified applicants from its hiring hall to jobs on the Rockford project. Pet. App. 37, 47.

a. After a hearing, the administrative law judge (ALJ) concluded that the Union violated Section 8(b)(1)(A) in the operation of its exclusive hiring hall, by failing to use objective criteria and standards in referring applicants to the Rockford jobsite for employment as rig welders. Pet. App. 56.[1] The ALJ

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[1] Initially, the ALJ noted that, although under the terms of the labor contract between Rockford and the United Association "[Rockford] chose 6 employees, leaving the Union with the task of referring 7 employees[,] * * * the Union operated an exclusive hiring hall notwithstanding that [Rockford] had the right to choose half the employees." Pet. App. 49 n.1. In the

explained that "Galloway testified that he was not familiar with pipeline work and that he referred employees based on the recommendations of Manning and some business managers from other locals." *Id.* at 50. However, other than making one referral on the basis of a recommendation supplied by the applicant's uncle, the ALJ found that Galloway "could not explain how the employees were selected from the pool of recommended employees." *Ibid.* Similarly, the ALJ observed that "Manning admitted that he gave recommendations to Galloway but denied any knowledge as to how the employees were chosen." *Id.* at 50-51. Further, the ALJ noted that neither Galloway nor Manning could explain how applicants were selected for referral to job openings which were created when some employees failed the welding test. *Id.* at 51. Accordingly, the ALJ concluded that the Union's operation of its exclusive hiring hall violated Section 8(b)(1)(A) because "it is * * * impossible to find any objective criteria or standards for choosing among the qualified applicants." *Id.* at 51-52. Rather, the ALJ explained that, "[w]hile the record shows that Manning and Galloway attempted to refer only qualified and dependable welders, at best a subjective test was used," with the result that "[q]ualified welders such as Harper and Flowers could not be considered because they were unknown to Galloway and Manning." *Id.* at 51.

The ALJ also concluded that the Union violated Section 8(b)(2) of the NLRA, 29 U.S.C. 158(b)(2), by

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court of appeals, the Union did not challenge the Board's determination that it operated an exclusive hiring hall with respect to the Rockford project, and it does not contest the Board's ruling in this Court.

discriminating against Harper, Flowers, and other rig welders seeking job referrals, for reasons not based on objective criteria and standards, thereby causing Rockford to refuse to hire them. Pet. App. 56-57.[2] The ALJ explained that, by making job referrals on the basis of a "subjective test," the Union "discriminate[d] in favor of associates of Galloway and Manning" (*id.* at 51), for "[e]mployees unknown to Manning, such as Harper and Flowers, would be excluded" from the pool of applicants eligible for dispatch to rig welding jobs "no matter how qualified" (*id.* at 53-54).

To remedy its unfair labor practices, the ALJ ordered the Union, among other things, to cease and desist from failing to use "objective, consistent criteria and standards" in referring applicants to the Rockford project or to jobs with "any other employer with whom [the Union] maintains an exclusive job-referral system for pipeline welders," and to make Harper and Flowers whole for any losses they may have suffered by reason of the Union's discriminatory refusal to dispatch them to jobs on the Rockford project. Pet. App. 60-61.

b. The Board affirmed the ALJ's findings and conclusions, and adopted his remedial order. Pet. App. 33-35.

3. The court of appeals enforced the Board's order. Pet. App. 1-31. The court explained that "a union commits an unfair labor practice if it administers

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[2] The ALJ noted that, "[a]lthough the complaint only alleges a violation of Section 8(b)(1)(A), the issue of a refusal to refer Harper and Flowers was alleged in the complaint," and, moreover, "the refusal to refer the welders was fairly and fully litigated." Pet. App. 55 n.2.

the exclusive hall arbitrarily or without reference to objective criteria and thereby affects the employment status of those it is expected to represent." *Id.* at 16 (quoting *Boilermakers Local No. 374* v. *NLRB*, 852 F.2d 1353, 1358 (D.C. Cir. 1988)). Applying that principle, the court held that substantial evidence supported the Board's finding that the Union operated its hiring hall in violation of the NLRA. Pet. App. 24. The court found that "[t]he ALJ's conclusion that the applicant pool was closed to anyone unknown to [Union] officials is confirmed by Galloway's own testimony," and that "[t]he barriers to unknown applicants are further illustrated by the run-around that Harper and Flowers encountered." *Id.* at 24-25. The court agreed with the ALJ that "'at best a subjective test was used' that 'discriminate[d] in favor of associates of Galloway and Manning.'" *Id.* at 27-28. "The union's actions," the court observed, "plainly violated its fiduciary duty to treat applicants 'even-handedly,' to inform all potential applicants of relevant hiring hall rules, and to allow qualified individuals to register for work." *Id.* at 26.

In sustaining the Board's order, the court rejected the Union's contention that, because "a breach of the duty of fair representation does not amount to an unfair labor practice[,] * * * the Board lacked jurisdiction in this case." Pet. App. 11. The court explained that it had long held "that a breach of the duty of fair representation can constitute an unfair labor practice within the jurisdiction of the Board." *Id.* at 12. The court also rejected the Union's contention that, "[b]ecause the Board's General Counsel alleged a violation of the duty of fair representation, * * * the ALJ should have applied the 'highly deferential' interpretation of the 'arbitrary' com-

ponent of that duty" set forth in *Air Line Pilots Ass'n* v. *O'Neill*, 499 U.S. 65 (1991). Pet. App. 17-18. The court explained that "[a]t issue in *O'Neill* was a duty of fair representation challenge to the substantive provisions of a strike settlement," and that, "[a]ttentive to the special role of the union as negotiator, the Court required that '[a]ny substantive examination of a union's performance * * * must be highly deferential, recognizing the wide latitude that negotiators need for the effective performance of their bargaining responsibilities.'" *Id.* at 20, 21 (quoting *O'Neill*, 499 U.S. at 78). By contrast, the court explained, "[t]his case does not involve a negotiated agreement"; rather, "[a]t issue here is the operation of a hiring hall, where the union has assumed the role of employer, as well as representative, and where the risk of judicial second-guessing of a negotiated agreement * * * is simply not present." Pet. App. 22.

ARGUMENT

1. In *Local 357, Int'l Brotherhood of Teamsters* v. *NLRB*, 365 U.S. 667, 674-677 (1961), this Court held that the use of a union hiring hall as the exclusive source of job referrals does not constitute discrimination within the meaning of the NLRA, provided that the hiring hall is open to both members and nonmembers and that there is no showing of discrimination against nonmembers. The operator of an exclusive hiring hall, however, owes a duty of fair representation to the users of the hall, and that duty includes an obligation to operate the hall in a manner that is "nonarbitrary and nondiscriminatory." *Breininger* v. *Sheet Metal Workers Int'l Ass'n Local Union No. 6*, 493 U.S. 67, 88 (1989). As the Board has

explained, "a labor organization must conform with and apply lawful contractual standards in the operation of the [hiring] hall and any departure from such standards which results in a denial of employment to an applicant for referral" constitutes the kind of "unfair, irrelevant, or invidious" treatment that violates the union's duty of fair representation, absent a showing that "the action was necessary for the effective performance of [the union's] function of representing its constituency." *International Union of Operating Engineers Local 406*, 262 N.L.R.B. 50, 57 (1982), enforced, 701 F.2d 504 (5th Cir. 1983).

Consistent with those principles, the Board reasonably found that the Union operated its exclusive hiring hall in an unlawful manner. Pet. App. 56-57. As the ALJ observed, "it is * * * impossible to find any objective criteria or standards for choosing among the qualified applicants" for job openings on the Rockford project (*id.* at 51-52); rather, "[w]hile the record shows that Manning and Galloway attempted to refer only qualified and dependable welders, at best a subjective test was used," with the result that "[q]ualified welders such as Harper and Flowers could not be considered because they were unknown to Galloway and Manning" (*id.* at 51). Similarly, the ALJ found, by operating its hiring hall as it did, the Union "discriminate[d] in favor of associates of Galloway and Manning" (*ibid.*), and "[e]mployees unknown to Manning, such as Harper and Flowers, would be excluded" from the pool of applicants eligible for dispatches "no matter how qualified" (*id.* at 53-54). The court of appeals sustained the Board's findings as supported by substantial evidence. *Id.* at 24. The court's fact-bound

holding raises no issue warranting further review by this Court. *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 (1951).

2. Petitioner contends that the decision of the court of appeals conflicts with this Court's decision in *Air Line Pilots Ass'n* v. *O'Neill*, 499 U.S. 65 (1991). Pet. 9. Petitioner's contention is mistaken.

As the court of appeals explained (Pet. App. 20), "[a]t issue in *O'Neill* was a duty of fair representation challenge to the substantive provisions of a strike settlement," not a challenge to the union's operation of an exclusive hiring hall. Because "Congress did not intend judicial review of a union's performance to permit the court to substitute its own view of the proper *bargain* for that reached by the union," the *O'Neill* Court concluded that "[a]ny substantive examination of a union's performance, therefore, must be highly deferential, recognizing the wide latitude that negotiators need for the effective performance of their *bargaining* responsibilities." 499 U.S. at 78 (emphasis added). In that context, the Court held that "a union's actions are arbitrary only if, in light of the factual and legal landscape at the time of the union's actions, the union's behavior is so far outside a wide range of reasonableness as to be irrational." *Id.* at 67 (internal quotation marks and citation omitted).

Nothing in *O'Neill* suggests that the same degree of deference is owed to a union's conduct in operating a hiring hall. As the court of appeals explained, in the hiring hall context, "the union has assumed the role of employer, as well as representative, and * * * the risk of judicial second-guessing of a negotiated

agreement that was of such concern to the Court in *O'Neill* is simply not present." Pet. App. 22.[3]

Petitioner similarly errs in contending (Pet. 10-11) that the court of appeals' conclusion is inconsistent with this Court's decision in *Breininger* v. *Sheet Metal Workers Int'l Ass'n Local Union No. 6, supra.* *Breininger* held that a union operating a hiring hall is not "relieved entirely of its duty of fair representation." 493 U.S. at 87. The Court explained that, in the hiring hall context, although referring workers to jobs "resembles a task that an employer might perform[,] * * * the union is administering a provision of the contract, something that we have always held is subject to the duty of fair representation." *Id.* at 88. The Court recognized, however, that, "if a union does wield additional power in a hiring hall by assuming the employer's role, its responsibility to exercise that power fairly *increases* rather than *decreases*." *Id.* at 89. *Breininger* thus supports the court of appeals' conclusion that, in view of a union's increased responsibility when it runs a hiring hall, the "highly deferential" test of *O'Neill*

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[3] Petitioner suggests (Pet. 11-12) that its authority in the hiring hall context was limited because "the contractor retained 'the right to reject any job applicant' " under the terms of the labor agreement between Rockford and the United Association. However, the Board made no findings with respect to how the contractual language was applied in actual practice. In any event, regardless of whether Rockford could have rejected a welder dispatched from the hiring hall, the opportunity for employment on the Rockford project depended on the applicant's ability initially to obtain a job referral from the union-operated hiring hall.

was not an appropriate standard for evaluating petitioner's conduct. See Pet. App. 22-23.[4]

3. Petitioner contends (Pet. 12) that review is warranted in this case because it "squarely present[s]" the "often mooted issue of Board jurisdiction over fair representation claims, unrelated to discrimination based on union membership."

First, contrary to petitioner's assertion, this case does not involve a duty-of-fair-representation claim "unrelated to discrimination based on union membership." Discrimination based on union "membership" includes that which encourages "participation in union activities" or encourages "adhesion to union membership." *Radio Officers' Union* v. *NLRB*, 347 U.S. 17, 40 (1954) (NLRA allows "employees to freely exercise their right to join unions, be good, bad, or indifferent members, or abstain from joining any union without imperiling their livelihood," subject only to proviso to Section 8(a)(3), 29 U.S.C. 158(a)(3)). The court, in agreement with the Board, found that petitioner operated its exclusive hiring hall in so "subjective" a fashion that the system effectively

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[4] Even were petitioner correct that the "highly deferential" standard of *O'Neill* applied to this case, the Board nevertheless would have been entitled to enforcement of its order. As the ALJ found, Union officials Galloway and Manning used "at best a subjective test" for determining which rig welders to dispatch from the hiring hall, and the manner in which the hiring hall was operated effectively "discriminate[d] in favor of associates of Galloway and Manning," making it impossible for "[q]ualified welders such as Harper and Flowers [to] be considered" for referrals. Pet. App. 51. Such conduct in the operation of an exclusive hiring hall may be fairly said to lie "so far outside a wide range of reasonableness as to be irrational." *O'Neill*, 499 U.S. at 67 (internal quotation marks and citation omitted).

"discriminate[d] in favor of associates of Galloway and Manning." Pet. App. 27-28. Such discrimination unlawfully encourages union "membership" as to all users of the hiring hall, for "the worker may easily suppose that it is necessary to curry [union officials'] favor to obtain referrals." *Local Union No. 277, Int'l Brotherhood of Painters* v. *NLRB*, 717 F.2d 805, 809 (3d Cir. 1983). Thus, the question whether the Board has jurisdiction over "an unadorned fair representation claim" (Pet. 12-13) is simply not presented by this case.

In any event, the decisions of this Court indicate that the Board has jurisdiction over duty-of-fair-representation claims generally. For example, in *Vaca* v. *Sipes*, 386 U.S. 171 (1967), a discharged union member filed a suit in state court alleging that his union had breached its duty of fair representation by failing to exhaust contractual grievance procedures on his behalf "arbitrarily, capriciously and without just or reasonable reason or cause." *Id.* at 173. This Court held that the state court had jurisdiction to entertain the suit. The Court excepted such duty-of-fair-representation claims from the preemption principle of *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236 (1959). See 386 U.S. at 176-188. In reaching that conclusion, the Court did not suggest that state court jurisdiction was permissible because the Board had no jurisdiction over the claim. Instead, the Court's reasoning rested entirely on the proposition that, although the Board had asserted jurisdiction over unfair representation claims as unfair labor practices under the NLRA, see *id.* at 176-177, state court litigation of such claims was nonetheless permissible, see *id.* at 178-188. See also *Breininger*, 493 U.S. at 75 (applying *Vaca* to duty-of-

fair-representation claims arising out of the operation of union hiring halls). The reasonable implication of *Vaca* and *Breininger* is thus that the Board shares concurrent jurisdiction with the courts to hear duty-of-fair-representation claims, a view that has been uniformly adopted by the courts of appeals.[5] As there is no conflict among the circuits on the issue, further review is not warranted.

4. Petitioner also contends (Pet. 16) that the Board and the court of appeals were "wrong" to conclude that petitioner breached its duty of fair representation in the circumstances of this case, because, according to petitioner, its recruitment and dispatch system were "predicated on the work record and reputation for reliability of applicants" and was "actuated by a desire to refer only qualified and dependable workers." Petitioner's argument, however, is flatly contrary to the facts, as found by the Board and the court of appeals. The ALJ found that, "[w]hile the record shows that Manning and Galloway attempted to refer only qualified and dependable welders, at best a subjective test was used" (Pet. App. 51), and that "[there] is no evidence of what criteria, if any, Galloway used in referring employees" (*id.* at 53). The court agreed, finding that, "[w]hile the parties stipulated that [the Union] sought to refer 'competent

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[5] See, *e.g.*, *Branch 6000, Nat'l Ass'n of Letter Carriers* v. *NLRB*, 595 F.2d 808, 811 n.13 (D.C. Cir. 1979); *NLRB* v. *Local 282, Int'l Brotherhood of Teamsters*, 740 F.2d 141, 144-146 (2d Cir. 1984); *Newport News Shipbuilding & Dry Dock Co.* v. *NLRB*, 631 F.2d 263, 269-270 (4th Cir. 1980); *Kesner* v. *NLRB*, 532 F.2d 1169, 1173-1175 (7th Cir.), cert. denied, 429 U.S. 983, 1022 (1976); *Le'Mon* v. *NLRB*, 952 F.2d 1203, 1205 (10th Cir. 1991), cert. denied, 113 S. Ct. 93 (1992).

and reliable rig welders,' the record is devoid of any indication of [the Union's] methods for accomplishing this goal." *Id.* at 26-27. That case-specific finding does not warrant further review. *Universal Camera Corp.*, 340 U.S. at 490-491.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 1995